SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Argument	5
I. The Criminal Convictions—Upon Co-Petitioner Maita's Guilty Pleas—for California Penal Code Section 311.2 Violations (Willfully Exhibiting Obscene Films) Constitute Grounds for Alcoholic Beverages License Discipline Under the California Constitution and Under California Alcoholic Beverage Control Act Sections 24200(a) and 24200(d). Such Convictions Fully Support the Revocation Order Separately Imposed on Petitioners' Alcoholic Beverages License for Count III	5
II. The Department of Alcoholic Beverage Control May Discipline an Alcoholic Beverages License for Activities Contrary to Public Welfare and Morals. Obscenity Was Not a Required Element of Proof as to Count I. *California v. LaRue*, U.S. (Dec. 5, 1972)	7
Conclusion	9

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Argument	5
I. The Criminal Convictions—Upon Co-Petitioner Maita's Guilty Pleas—for California Penal Code Section 311.2 Violations (Willfully Exhibiting Obscene Films) Constitute Grounds for Alcoholic Beverages License Discipline Under the California Constitution and Under California Alcoholic Beverage Control Act Sections 24200(a) and 24200(d). Such Convictions Fully Support the Revocation Order Separately Imposed on Petitioners' Alcoholic Beverages License for Count III	5
II. The Department of Alcoholic Beverage Control May Discipline an Alcoholic Beverages License for Activities Contrary to Public Welfare and Morals. Obscenity Was Not a Required Element of Proof as to Count I. *California v. LaRue*, U.S. (Dec. 5, 1972)	7
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES

Page

In re Boyd, 48 Cal.2d 69, 70 (1957) 7

California v. LaRue, ... U.S. ....., Oct. Term, 1971, No. 71-36 (Dec. 5, 1972) 7, 8, 9

Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 (1946) 4

Francisco Enterprises v. Kirby, Director of the Dept. of Alcoholic Beverage Control, ... F. Supp. ..... (U.S.D.C.) Northern Dist. Calif. (1971) 4

MacFarlane v. Dept. of Alcoholic Beverage Control, 51 Cal.2d 84, 91 (1958) 7

Martin v. Alcoholic Beverage Controls Appeals Board, 52 Cal.2d 238 (1959) 4

Martin v. ABC Appeals Board & Haley, 52 Cal.2d 287, 291, 293 (1959) 7

Otash v. Bureau of Private Investigators, 230 Cal. App.2d 568, 571 (1964) hearing denied by Cal. Supreme Court 7

Vallerga v. Dept. of Alcoholic Beverage Control, 53 Cal.2d 313, 319 (1959) 8

STATUTES

Pages

California Alcoholic Beverage Control Act:
§ 24200(a) & 24200(d) 2, 3, 5, 6, 7, 9

California Penal Code:
§ 311 subd. (a) 7
§ 311.2 ..... 2, 3, 4, 5, 6, 7

CONSTITUTIONS

California Constitution:
Article XX, Section 22 ..... 2, 4, 5, 6, 7

United States Constitution:
Twenty-first Amendment 8, 10

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-800

PHILIP JOSEPH MAITA AND JOHN McRAE,
Petitioners,

VS.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

OPINION BELOW

The final order of the Alcoholic Beverage Control Appeals Board of the State of California affirming the decision of the Department of Alcoholic Beverage Control of the State of California is contained in the Appendix to the Petition for a Writ of Certiorari. (See Appendix "A", Petition for a Writ of Certiorari).

The California Court of Appeal denied petitioners' petition for a writ of review (certiorari) on August 10, 1972, without opinion. (See Appendix "B", Petition for a Writ of Certiorari).

The California Supreme Court denied petitioners' petition for a hearing on September 7, 1972, without opinion (See Appendix "C", Petition for a Writ of Certiorari).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of section 1257(3) of Title 28, United States Code.

QUESTIONS PRESENTED

Does the First Amendment bar the State of California from revoking the liquor license of an alcoholic beverage licensee who has been convicted, upon his pleas of guilty, of two violations of California Penal Code Section 311.2 for willfully exhibiting obscene films on the licensed alcoholic beverages premises?

Does the First Amendment bar the State of California from revoking the liquor license of a licensee who, contrary to the public welfare and morals, has exhibited explicit, sexually-oriented films on his state licensed on-sale alcoholic beverages premises?

STATUTES INVOLVED

The statutes involved are Article XX, Section 22 of the California Constitution; sections 24200(a) and 24200(d) of the California Alcoholic Beverage Control Act; and section 311.2 of the California Penal Code. The pertinent provisions of the aforesaid constitutional provision and statutes are:

California Constitution, Article XX, Section 22

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. *The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that*

the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude." (Emphasis added)

California Alcoholic Beverage Control Act, Sections 24200 (a) and 24200 (d)

"§ 24200. The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution.

• • • • •

(d) The plea, verdict, or judgment of guilty to any public offense involving moral turpitude or . . ."

California Penal Code, Section 311.2

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor."

STATEMENT OF THE CASE

The petitioners-licensees exhibited certain films on their state licensed alcoholic beverages premises which depicted various explicit sexual activities between persons of both sexes and between persons of the same sex. Concurrent

with an alcoholic beverages control investigation of the activities occurring on the licensed premises, the co-petitioner-licensee Maita was arrested for violations of California Penal Code section 311.2 (willfully exhibiting obscene films) and the films were seized. The films were subsequently ordered destroyed by the state criminal court following co-petitioner-licensee Maita's convictions—upon his pleas of guilty—for violations of California Penal Code section 311.2 (willfully exhibiting obscene films).

An accusation was filed with the California Department of Alcoholic Beverage Control (hereinafter referred to as the Department) against petitioners' on-sale alcoholic beverages license. The accusation was pled in two counts. Count I alleged in numerous subcounts that the petitioners-licensees had permitted films to be exhibited on the licensed alcoholic beverages premises which depicted various types of explicit sexual activity between persons of both sexes and between persons of the same sex. Count II alleged in numerous subcounts that the petitioners-licensees had permitted certain behavior on the licensed alcoholic beverages premises and had employed nude cocktail waitresses and dancers.

Following the criminal convictions of co-petitioner-licensee Maita for violations of California Penal Code Section 311.2, the accusation was amended to allege as Count III that co-petitioner-licensee Maita had pled guilty to, and had been convicted of, violations of California Penal Code section 311.2 (willfully exhibiting obscene films).

Thereafter, an adjudicatory hearing was held on the accusation before the Department[1]. The Department's Deci-

---

1. The California Department of Alcoholic Beverage Control is a California state court of limited jurisdiction. Calif. Constitution, Art. XX, Sec. 22; Francisco Enterprises v. Kirby, Director of the Dept. of Alcoholic Beverage Control, ... F. Supp. ..... (U.S.D.C., Northern Dist. Calif. 1971); Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d 238 (1959); Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 (1946).

sion found the allegations of the accusation to be true—save and except for two subcounts of both Counts I and II—and provided for the revocation of petitioners' alcoholic beverages license separately and severally as to each count.

The petitioners-licensees filed an appeal with the California Alcoholic Beverage Control Appeals Board (hereinafter referred to as the Appeals Board), an appellate tribunal established by the California Constitution to review adjudicatory decisions of the Department. California Constitution, Article XX, Section 22.

After receiving written and oral argument, the Appeals Board filed its final order wherein it affirmed the Department's decision as to Counts I and III, and reversed the Department's decision as to Count II. (See Appendix "A", Petition for Writ of Certiorari).

The petitioners-licensees then filed a petition for a writ review (certiorari) in the California Court of Appeal. The Court of Appeal denied the petition. (See Appendix "B", Petition for Writ of Certiorari). The petitioners-licensees then sought a hearing in the California Supreme Court which denied their petition (See Appendix "C", Petition for Writ of Certiorari)

ARGUMENT

I. The Criminal Convictions—Upon Co-Petitioner Maita's Guilty Pleas—for California Penal Code Section 311.2 Violations (Willfully Exhibiting Obscene Films) Constitute Grounds for Alcoholic Beverages License Discipline Under the California Constitution and Under California Alcoholic Beverage Control Act Sections 24200(a) and 24200(d). Such Convictions Fully Support the Revocation Order Separately Imposed on Petitioners' Alcoholic Beverages License for Count III.

As a result of the films being shown on the licensed premises, co-licensee Maita was arrested and was convicted—upon his pleas of guilty—to violations of Penal Code

section 311.2 (willfully exhibiting obscene films). Said convictions were alleged and found to be true under Count III of the Department's decision. The Department found that the convictions constituted grounds for license discipline under Article XX, Section 22 of the California Constitution, and under Sections 24200(a) and 24200(d) of the Alcoholic Beverage Control Act. The license discipline imposed for Count III was revocation.

The California Constitution, Article XX, Section 22, provides in pertinent part:

> ". . . The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

Alcoholic Beverage Control Act, Section 24220, subdivision (a) provides (Div. 9, Calif. Bus. & Prof. Code):

> "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:
>
> "(a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under Article XX, Section 22, of the Constitution."

And finally, Alcoholic Beverage Control Act, Section 24200, subdivsion (d), provides:

> "The following are the grounds which constitute a basis for the suspension or the revocation of licenses:
>
> "(d) The plea, verdict, or judgment of guilty to any public offense involving moral turpitude. . . ."

Co-licensee Maita pled guilty to, and was convicted of, violations of Penal Code Section 311.2 for willfully exhibiting obscene films.

As set forth in *Otash v. Bureau of Private Investigators,* 230 Cal.App.2d 568, 571 (1964), hearing by California Supreme Court denied: "Moral turpitude, broadly defined, is any conduct which is contrary to justice, honesty and good morals." And see *In re Boyd,* 48 Cal.2d 69, 70 (1957).

Penal Code Section 311, subdivision (a), defines "obscene" as that term is used in Section 311.2 (of which co-licensee Maita pled guilty to and was convicted) as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Convictions for willfully exhibiting obscene films are both and severally: (1) convictions for public offenses involving moral turpitude per se, and (2) conduct by the licensee contrary to public welfare and morals. The revocation of petitioners' license under Count III was proper and did not constitute a clear abuse of discretion. California Constitution, Article XX, Section 22; Alcoholic Beverage Control Act, Section 24200, subdivisions (a) and (d); *Macfarlane v. Dept. of Alcoholic Beverage Control,* 51 Cal.2d 84, 91 (1958); *Martin v. ABC Appeals Board & Haley,* 52 Cal. 2d 287, 291, 293 (1959).

II. The Department of Alcoholic Beverage Control May Discipline an Alcoholic Beverages License for Activities Contrary to Public Welfare and Morals. Obscenity Was Not a Required Element of Proof as to Count I. California v. LaRue, ... U.S. (Dec. 5, 1972)

Under Count I of the Department's decision it was found that the licensees had permitted the exhibiting of various

films on the licensed alcoholic beverages premises which depicted explicit sexual activities between persons of both sexes and between persons of the same sex, and that such activities on the licensed premises were contrary to the public welfare and morals. The petitioners' alcoholic beverages license was separately revoked for Count I.

Petitioners assert that their alcoholic beverages license may not be disciplined for the exhibiting of films on state licensed alcoholic beverages premises without proof that the films were obscene. Such a contention rests upon the petitioners' basic premise that explicit sexual activity constitutes "expression" and is protected by the First Amendment unless proved to be obscene.

That a state may regulate such activity on licensed alcoholic beverages premises without proof of obscenity was recently upheld by this Honorable Court in *California v. LaRue,* ..... U.S. ....., October Term, 1971, No. 71-36 (December 5, 1972). And see United States Constitution, Twenty-first Amendment.

In *Vallerga v. Dept. of Alcoholic Beverage Control,* 53 Cal.2d 313, 319 (1959), the California Supreme Court observed:

> ". . . . 'There are many things that can be done in the privacy of the home which may not be illegal, but if done in a public tavern are directly offensive to public morals and decency, ... The continuance of the license under such circumstances "would be contrary to public welfare or morals" as provided in our Constitution. . . ."

and then the California Supreme Court held:

> "Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances (see *Ker-*

shaw v. Dept. of Alcoholic Beverage Control, supra, 155 Cal.App.2d 544, 547-548), may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. *But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society."*

It is important to note, that even should this Honorable Court find merit as to petitioners' contentions as to Count I, that revocation of petitioners' license was imposed separately and independently for Count III. Any reversal of the Department's decision as to Count I would not affect the revocation independently imposed for Count III.

CONCLUSION

Petitioners' alcoholic beverages license was revoked separately and severally for petitioners exhibiting explicit sexual films on their licensed alcoholic beverages premises (Count I) and for petitioner Maita's criminal convictions —upon his pleas of guilty—for willfully exhibiting obscene films on the licensed premises (Count III).

Such activities and convictions involving state licensed alcoholic beverages premises constitute clear grounds for the revocation of petitioners' alcoholic beverages license under the California Constitution and under the California Alcoholic Beverage Control Act.

The petition for a writ of certiorari should be denied United States Constitution, Twenty-first Amendment; *California v. LaRue,* ..... U.S. ..... (1972).

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the
State of California

L. STEPHEN PORTER
Deputy Attorney General of the
State of California

Attorneys for Respondent